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No. 88-768

In the Supreme Court of the United States

OCTOBER TERM, 1988

VINCENT FRANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his due process rights were violated because his immediate supervisor acted as both the proposing and deciding official in removing petitioner from federal employment pursuant to 5 U.S.C. 4303.

1. Petitioner was a Technical Publications Writer, GS-11, in the Office of Health Research Reports (OHRR) of the National Institute of Arthritis, Diabetes, and Digestive and Kidney Diseases (NIADDKD). Pet. App. 1-2. On April 1, 1985, petitioner's supervisor, the Director of OHRR, gave petitioner a rating of "unacceptable" for his performance during the 1984 calendar year because he had failed to meet Critical Element 1 of his performance plan.[1] On April 17, 1985, petitioner's supervisor advised

[1] This element required petitioner to (Pet. App. 13):

> Prepare summaries of research articles published in the biomedical literature about the results of NIADDK-supported research for the purpose of translating technical information into lay-level language.

petitioner in writing that he was being given 90 days—later extended an additional 30 days—to improve his performance and that failure to bring his performance up to an acceptable level could result in his termination from federal employment or a reduction in grade. At the end of the improvement period, petitioner's supervisor concluded that petitioner's work during the period was still unacceptable. Accordingly, on October 4, 1985, she proposed to remove petitioner pursuant to 5 U.S.C. 4303. On November 18, 1985, she issued a final decision for the agency in which she concluded that removal was warranted. Pet. App. 12-14. The removal decision was concurred in by the Acting Director of NIADDKD. Pet. App. 46-47, 60.

2. a. Petitioner appealed the agency's decision to a regional office of the Merit Systems Protection Board (MSPB). An administrative law judge (ALJ) upheld the removal, concluding that the performance standards in Critical Element 1 were not too vague; that petitioner had an adequate period of time in which to improve his performance; that substantial evidence supported the agency's action; that petitioner failed to demonstrate that any procedural error had been committed; and that petitioner had failed to demonstrate that any alleged bias or personal dislike by his supervisor had a bearing on the removal decision. Pet. App. 11-37.

b. Petitioner filed a petition for review with the MSPB, which was granted. Pet. App. 38-39. The MSPB agreed with the ALJ's conclusion that the procedures followed by the agency were proper. Specifically, the MSPB found that the agency's designation of petitioner's supervisor as both the proposing and deciding official with respect to his removal did not violate 5 U.S.C. 4303.[2] The

[2] The MSPB declined to consider petitioner's additional claim that this procedure violated his right to due process, noting (Pet. App. 44

MSPB also declined to overturn the ALJ's finding that alleged bias by petitioner's supervisor had no bearing on the removal decision. Pet. App. 46-48. The Board nonetheless vacated the ALJ's determination that petitioner's performance had been shown to be unacceptable and remanded for further testimony on this issue. Specifically, the Board found that the ALJ erred in precluding petitioner from offering testimony by the Acting Director of NIADDKD, who concurred in the removal, and by petitioner's prior supervisor. Pet. App. 49-55.

c. Following an additional hearing, at which both the concurring official and petitioner's prior supervisor testified, the ALJ again affirmed the agency's action. He concluded that the Acting Director of NIADDKD, as required by 5 U.S.C. 4303(b)(1)(D)(ii), had "exercised his own considered judgment on the merits in reaching the decision to concur" in petitioner's removal (Pet. App. 60). He also concluded (*id.* at 73) that "the agency * * * has established by substantial evidence that [petitioner] failed to meet the performance standard for critical element one and that his performance was therefore 'unacceptable' " within the meaning of 5 U.S.C. 4301(3). This decision became the final decision of the MSPB, after the Board declined to review it.

3. The Federal Circuit affirmed (Pet. App. 1-10), holding that the Board's decision was supported by substantial evidence. The court also concluded that the agency followed the removal procedures set forth in 5 U.S.C. 4303 and that "the statute does not prohibit the same person from serving as proposing and deciding official, even where that person also has a role in the super-

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n.3) that this argument had been raised for the first time in the petition for review.

visory hierarchy." Pet. App. 2-3 (citing *Hanley* v. *GSA*, 829 F.2d 23, 25 (Fed. Cir. 1987); *DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985)). The court noted that 5 U.S.C. 4303(b)(1)(D)(ii) requires that a person in higher supervisory status exercise considered judgment in concurring in the removal and concluded that petitioner had failed to demonstrate that the concurring offical had not exercised the required judgment in this case. Finally, the court held that "the statute is not flawed in terms of due process of law." Pet. App. 3.

Judge Baldwin dissented. He acknowledged that prior Federal Circuit cases established that the proposing and deciding official in a performance-based removal action could be the same person. He proposed an exception to that rule, however, where "that person is also the employee's immediate supervisor who is charged with the daily evaluation of the employee" (Pet. App. 10). Judge Baldwin considered it "unreasonable to expect that anything that petitioner could say to his supervisor during an informal hearing could cause her to change her mind about these evaluations" (*id.* at 9-10). Thus, he concluded that "the peculiar circumstances of this performance-based removal action violat[ed] petitioner's due process rights" (*id.* at 10).

4. Petitioner does not challenge the substantiality of the evidence that his performance was unacceptable. Nor does petitioner dispute that the agency fully complied with 5 U.S.C. 4303 in removing him from his position. Petitioner contends only that his due process rights were violated because his immediate supervisor both proposed his removal and acted as the decisionmaker. The court of appeals rightly rejected this contention, and its decision on this issue does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

In *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985), this Court held that before an individual may be removed from public employment, he must receive a pre-termination hearing. That hearing, however, "need not definitively resolve the propriety of the discharge" (*id.* at 545). Rather, it need only determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed adverse action (*id.* at 545-546). Thus, a career federal employee, such as petitioner, is entitled only to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story (*id.* at 546). Petitioner concedes (Pet. 8-9) that he was notified of his proposed termination and that he had an opportunity – which he used – to respond orally and in writing to his proposed termination. "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee" (470 U.S. at 546).

Due process does not require that the decision to remove a federal employee come from someone other than the employee's immediate supervisor who proposed the removal in the first place. Indeed, the employee's immediate supervisor is plainly in the best position to evaluate the quality of the employee's work. And there is no reason to believe that supervisors are inherently incapable of dispassionately considering explanations offered by employees for allegedly inadequate performance. Furthermore, a higher official in the agency must exercise considered judgment in concurring in the removal (see Pet. App. 3). This concurrence serves as an independent check upon the judgment of the immediate supervisor, as of course does post-termination review by the MSPB.

Although petitioner asserted that his supervisor's decision to remove him was based on bias and personal dislike,

the ALJ expressly rejected that contention. Pet. App. 34.[3] The MSPB found no basis for disturbing this finding, and the court of appeals concluded that the Board's decision was supported by substantial evidence. In any event, such allegations of bias are not sufficient to require that a wholly neutral decisionmaker be appointed to conduct a pre-removal hearing.

In *Arnett* v. *Kennedy,* 416 U.S. 134, 137 (1974), an employee was removed from his job as a field representative in the Chicago Regional Office of the Office of Economic Opportunity (OEO) for, inter alia, falsely stating that the Regional Director of the OEO and his administrative assistant had attempted to bribe a representative of a community action program that dealt with OEO. The employee argued that he had a right to a trial-type hearing before an impartial hearing officer before he could be removed. Although the Court did not issue a majority opinion, "six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits." *Loudermill,* 470 U.S. at 542. More significantly, for present purposes, a majority of the Justices in *Arnett* found no constitutional infirmity in allowing the Regional Director—the person accused of making the attempted bribe—to conduct the pre-removal hearing, despite the fact that "a charge that an employee had defamed a supervisor may

[3] The ALJ pointed out that the record in fact "demonstrates considerable patience and tolerance by" petitioner's supervisor. She had been concerned about the quality of petitioner's work for nearly two years before she proposed to remove him; petitioner was given 120 days in which to improve; and many efforts were made to assist petitioner in improving his performance (Pet. App. 34).

generate a maximum of personal involvement on the part of the latter." *Arnett,* 416 U.S. at 156 n.21.[4]

Surely, if a defamed supervisor may preside at the pre-removal hearing of the person who allegedly defamed him, then a supervisor may conduct a pre-removal hearing for her subordinate whose work she finds unacceptable. Petitioner in this case had the pre-removal hearing contemplated by this Court in *Loudermill.* Moreover, as the more than 60 pages of MSPB opinions demonstrate, petitioner also had extensive post-termination hearings by neutral decisionmakers in which his claims were fully considered. "A fundamental requirement of due process is 'the opportunity to be heard' at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). Petitioner has been afforded all the process that is due.

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[4] Justice Powell in his opinion recognized the significant practical problems that would be created by a requirement that an "impartial decisionmaker" conduct the pre-removal hearing (*Arnett,* 470 U.S. at 170-171 n.5):

> In most cases, the employee's supervisor is the official best informed about the "cause" for termination. If disqualification is required on the ground that the responsible supervisor could not be wholly impartial, the removal procedure would become increasingly complex. In effect, a "mini-trial" would be necessary to educate the impartial decisionmaker as to the basis for termination.

Petitioner's reliance on such cases as *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970) (termination of welfare benefits) and *Withrow* v. *Larkin,* 421 U.S. 35 (1975) (state board's investigation of practices of medical doctors), for the proposition that the pre-removal decisionmaker must be impartial, is misplaced. Neither of those cases involved termination of public employment. As this Court has repeatedly recognized, the procedures required to satisfy due process vary with the nature of the interest at stake and the circumstances. *Brock* v. *Roadway Express, Inc.,* 481 U.S. 252, 262 (1987); *Boddie* v. *Connecticut,* 401 U.S. 371, 378 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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